

DSHS HIPAA Privacy Rule Requirement Worksheet

1. Requirement Number: #8.13

2. Date: January 9, 2002 (Revised 3/22/02)

3. Originator: Marie Myerchin-Redifer
Title: DSHS Privacy Officer

4. Requirement Title: Preemption of State Law

5. CFR Citation: 45 CFR §160.201-205 Preemption of State Law

6. Requirement: *(Provide a clear definition of the requirement as it applies to DSHS)*

Introduction:

The Supremacy Clause of the United States Constitution mandates that a federal law overrides a state law when there is a conflict between the two. Similarly a federal agency may preempt contrary state law by regulation.

For purposes of the privacy rule, state law includes its constitution, statutes, rules, common law and any other state action that has the force and effect of law. Covered Entities need to determine whether state law, the Health Insurance Portability and Accountability Act (HIPPA), or both laws apply in terms of privacy.

The Health Insurance Portability and Accountability Act (HIPAA) - Privacy Rule sets the regulatory floor. It does not preempt state laws that provide greater protection than the rule. The general rule under HIPAA is that state law provisions “contrary” to the privacy rule are preempted by the federal requirements.

A state law is considered contrary to the HIPPA privacy rule in two instances when:

- 1) Compliance with both laws is impossible; and
- 2) A conflict exists that stands as an obstacle to accomplishing the federal objective.

Under this analysis, a state can enforce a law that prohibits or restricts a use or disclosure permitted under the privacy rule, if it does not interfere with privacy rule compliance or with the ability of the individual to obtain their own health information. A state can allow greater individual rights than required under the privacy rule.

When state law privacy requirements are not “contrary” to a provision of HIPAA, there is no need for a conflicts analysis and the state and federal law apply. If the state imposes a requirement for which there is no corresponding federal requirement, then the state law applies.

Generally, the privacy rule preempts state law provisions that are contrary to it. However, there are exceptions to the rule.

- a) No preemption for state laws that the Secretary determines are necessary to prevent fraud and abuse; to ensure appropriate state regulation of insurance and health plans; for state reporting on health care delivery and other purposes.
- b) No preemption for state laws that address controlled substances.
- c) No preemption for state laws relating to the privacy of individually identifiable health information that are contrary to and more stringent than the privacy rule standard, requirement, or implementation specification adopted under the privacy rule.
- d) No preemption for state law including state procedures established under such law as applicable provides for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health surveillance, investigation, or intervention.
- e) No preemption for state law requiring a health plan, to report, or to provide access to, information for the purpose of management audits, financial audits, program monitoring and evaluation, or the licensure or certification of facilities or individuals. (See 45 CFR §160.203 (a), (b), (c), (d)).

Note: To be considered more stringent than the privacy rule, the state law must allow for greater rights or protections to the individual.

The Department of Social and Health Services has to distinguish whether state law and/or other federal laws are more stringent than the privacy rule. The privacy rule sets the floor for the protection of health information. In the absence of more information from DHHS, decisions on preemption will have to be based on a reasonable interpretation by the agency.

Requesting An Exception to Preemption by the Privacy Rule:

The Secretary of DHHS requires a provision-by-provision comparison of state and federal requirements when a state requests an exception to the privacy rule.

A request for an exception to preemption by the privacy rule may be submitted by a state through its chief elected official or designee to the Secretary of DHHS.

Written Request for an Exception to Preemption by the Privacy Rule:

The written request for an exemption to preemption by the privacy rule must include the following information:

- The state law for which the exception is requested;
- The specific provision in the privacy rule for which the exception is requested;
- The part of the privacy rule that will not be implemented based on the exception or the additional data to be collected based on the exception;
- How the health care provider, health plan, and other entities would be affected by the exception;
- The reasons why the state law should not be preempted by the federal privacy rule, including how the state meets one or more of the exceptions to preemption as listed in the rule; and
- Any other information the Secretary may request in order to decide whether the state law should be exception from the privacy rule requirements.

DHHS Secretary's Decision:

The DHHS Secretary's decision is made on the basis of information provided and factors demonstrating that one or more of the exceptions to preemption are met by the state law.

Duration of State Law Exception:

An exception granted to the privacy rule remains in effect until:

- a) Either the state law or privacy rule provision that provided the basis for the exception to preemption has materially changed so the reason for preemption no longer exists; or
- b) The Secretary revokes the exception, based on a decision that the grounds supporting the need for exception no longer exists.

7. Reporter:

Administration/Division/Office/Program:

8. Date:**9. How do things happen now?** *(Provide a detailed description of the current policy, process*

and/or practice relating to this requirement. If there is none indicate that. Include system functionality if it is a part of the process or practice. Identify whether the HIPAA privacy rule preempts state law.)

10. Describe what needs to happen in the future: *(This section should include a detailed description of the new or changed policies, processes or practices required to be implemented to meet the HIPAA Privacy requirements. If possible, provide detailed examples of how the change(s) will effect various case situations. This section should also include descriptions of other new/changed items such as forms, reports, interfaces, system changes, etc.)*

11. How will this be implemented? *(Describe implementation plans for new or change policies, processes and/or practices, including information about conversion and piloting new/changed practices and processes.)*

12. If required changes depend upon a decision or decisions that have not been made, please specify:

Describe the decision(s) that must be made:

When do you anticipate that his decision will be made? ____/____/____